84-214

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1984

ANTHONY RUGGIERO,

Petitioner

vs.

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 773, and SILVER LINE, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the granting (and affirmance) of the Respondents' Motions for Summary Judgment was proper wherein there are disputed facts of record as to why the Petitioner filed an action for wrongful discharge of employment without invoking the union's international procedures to review his grievance and the grounds for discharge.

2. Does the aforesaid action deprive the Petitioner of his rights to due process of law since there was never any hearing in which undisputed "exhaustion of remedies" facts of record were established upon which the Motion for Summary Judgment could be based.

3. Does the aforesaid action deprive the Petitioner of due process of law since at least one other Circuit (8th Circuit) has held that the issue of whether the Petitioner failed to exhaust his intra-union remedies (prior to the institution of suit) is not an issue approp-

riate for Summary Judgment but is an issue of fact to be determined by a jury.

4. Has the Petitioner properly prayed for damages that would fall within the well recognized exceptions to the exhaustion requirement as found in Clayton v. United Automobile Workers, 451 U.S. 679 101 S. Ct. 2088, 68 L.Ed. 2d 538 (1981).

5. Must the suit against the employer necessarily fail if the suit against the union is dismissed on a Motion for Summary Judgment where the suit against the union is for breach of its fiduciary duty to represent the Petitioner and the suit against the employer is inter alia for breach of the collective bargaining agreement.

PARTIES INVOLVED (as per Rule 21.1(b))

The Petitioner, Anthony Ruggiero, Jr., was the Plaintiff in the U.S. District Court for the Eastern District of Pennsylvania and the Appellant before the U.S. Court of Appeals

for the Third Circuit.

The Respondents, the Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 773 (the union) and Silver Line, Inc. (the employer) were Defendants in the District Court and Appellees in the Circuit Court. They both filed Motions for Summary Judgment (although not simultaneously) and both are Respondents before this Honorable Court since both Summary Judgments are at issue.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Anthony Ruggiero, Jr., (hereinafter Plaintiff) respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Third Circuit to review its decision affirming the Motions for Summary Judgment granted in favor of both Respondents (hereinafter Defendant-union and

Defendant-employer).

JUDGMENT AND ORDER BELOW

The Memorandum Opinion of the Court of Appeals for the Third Circuit, No. 83-1703, unpublished, is set out as Appendix "A", app. 3, as per Rule 21.1(k)(i) of this Court.

JURISDICTIONAL STATEMENT

On April 30, 1984, the Court of Appeals for the Third Circuit filed its Order and Memorandum Opinion herein (Appendix "A", app. 1). Plaintiff's timely filed Petition for Hearing was denied on May 17, 1984. Plaintiff's timely filed Petition to Stay Issuance of the Mandate was granted on June 5, 1984, and the issuance of the certified judgment in lieu of formal mandate was stayed until June 23, 1984.

This petition to review the judgment of a federal court of appeals in a civil case

is timely filed within ninety (90) days after denial of Petition for Rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), Section 2101(c) and Rules 20.2 and 20.4 of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No personal shall be...deprived of life, liberty or property without due process of law;..."

Rule 56 of the Federal Rules of Civil Procedure provices in pertinent part:

56(c)

> "The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact..."

56(d)

> "...the court at the hearing of the

> motions...shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted... and directing such further proceedings in the action as are just..."

STATEMENT OF THE CASE

A. Nature of the Case

The Plaintiff filed an action in equity in state court for breach of the Defendant-Union's duty to represent the Plaintiff in a grievance he filed for wrongful discharge from his employment as a truck driver with the Defendant-Employer. The Plaintiff also alleged the Defendant-Employer breached the collective bargaining agreement and acted in concert with the Defendant-Union to deny his claim.

The suit was removed to federal court by the Defendant-Union pursuant to 28 U.S.C. Section 1441(b).

Thereupon, the Parties engaged in various discovery and a pre-trial conference was held

and the matter was to be listed for trial after September 1, 1981. (See Appendix "C" App. 11.) Nevertheless, almost a year later, the Defendant-Union, on July 22, 1982, filed a Motion for Summary Judgment. The Defendant-Employer filed its Motion for Summary Judgment a year after that on August 15, 1983.

The U.S. District Court for the Eastern District of Pennsylvania granted both Motions for Summary Judgment and the Court of Appeals for the Third Circuit affirmed (Appendix "A", App. 1) and denied Plaintiff's timely filed Petition for Re-hearing (Appendix "B", App. 10.)

B. Jurisdiction of the Trial Court (as per Rule 21.1(a))

The basis for federal jurisdiction in the court of the first instance is Section 301(a) of the Labor Management Relations Act, 29 U.S. C. Section 185 which provides, in pertintent part:

> "Suits for violations of contracts between an employee and a labor organization representing employees

> in an industry affecting commerce... may be brought in any district court of the United States...without respect to the amount in controversy or without regard to the citizenship of the parties."

Further, 28 U.S.C. Section 1441(b) provides in pertinent part:

> "Any civil action of which the district courts have original jurisdiction... shall be removable [from the state court] without regard to the citizenship or residence of the parties..."

C. Statement Of Facts

PREFACE

The Plaintiff, Anthony Ruggiero, Jr., was an employee of the Defendant, Silverline, Inc., for approximately thirteen (13) years. During this period he was a member in good standing of the Defendant, Teamsters Local 773. (See Appendix "E", App 38., Plaintiff's Affidavit.) He had been employed as a truck driver when, on or about December 17, 1976, a dispute arose as to whether he should take a

certain delivery route with which he was not familiar and which was not the customary route for which the Plaintiff bid and had been given. (See Appendix "H", App. 62, Answer to Interrogatory No. 24.) As a result of Plaintiff's refusal to take such run, he was discharged.

Although at the time, the Plaintiff had been advised he was "laid-off" (and did, in fact, collect unemployment compensation), he was never subsequently called back to work although men with less seniority were called back or hired and, in fact, an employee who engaged in the same actionable conduct on the same day as the Plaintiff, was re-hired. (See Appendix "G", App. 56, Depositions of another employee.) As a result, the Plaintiff alleges he was, in effect, discharged from his employment.

EXHAUSTION OF UNION REMEDIES

The Plaintiff alleges he filed a grievance

(see Appendix "D", App. 16, Paragraph 11(c) of Complaint) protesting the discharge although the union argues no grievance was ever filed. From December of 1976 through November of 1977, the Plaintiff requested the local union No. 773 to process the matter through proper union machinery and follow the applicable collective bargaining agreement. In addition, the Plaintiff inquired into the status of available work during the period. Although Plaintiff had attempted to exhaust his union remedies at the local level (without success) he could not have exhausted union remedies at the international level since the time periods had expired or would shortly expire[2] and, moreoever, his complaint was with the local union and not the International.

[2]Pursuant to Article XIX, Section 1(b) of the Constitution of the International Teamsters Union, "any charge based upon alleged misconduct which occurred more than one (1) year prior to the filing of the charge is barred..."

During the initial year following discharge, the Plaintiff was never advised of the status of his grievance nor did either Defendant ever comply with the collective bargaining agreement in effect between the local union and the employer and specifically Article XII, Grievance Procedure. (See Appendix "D", App. 16, Paragraph 11(d) of Complaint.)

Upon seeking private legal representation, Plaintiff's counsel asked that the grievance procedure be followed and Plaintiff was led to believe an arbitration hearing would be held, evidenced by confirming correspondence of Plaintiff's counsel. (See Appendix "F", App. 44, Plaintiff's Counsel's Affidavit.) Such hearing was scheduled for December 19, 1978.

It is noteworthy that although this hearing was scheduled two (2) years after the discharge, the Plaintiff was never advised of any intra-union machinery (at the international level) to review the local union conduct. (See Appendix "E", App. 38.) In fact, the Plaintiff

was never advised of such intra-union procedures[3] until all applicable time limits to present said claims had expired. This is certainly the reason why the Plaintiff would agree to an arbitration hearing two (2) years after his discharge.

However, when the day came for the "arbitration", the Plaintiff was advised it was only to be a "mediation" of the dispute and when the local union Business Agent learned that a stenographer was present, he stated to the Plaintiff that the union would not proceed with the matter and the Plaintiff "should file any and all necessary lawsuits and other matters to protect his interest". (See

[3]Although the Defendant-Union in its Answer to the Complaint (Third Defense) alleges Plaintiff did not exhaust his intra-union remedies, no copy of the International Constitution allegedly applicable was ever made available for review by the Plaintiff until Motion for Summary Judgment was filed (July of 1982) that being five and one-half (5½) years after the discharge!

Appendix "E", App. 41, Plaintiff's Affidavit and Exhibit "A" attached thereto).

Further, prior to the hearings, the local union's representatives had discussed the matter with the mediator and when the mediator was questioned concerning his union/employer partiality, the mediator admitted same but advised that he could never be subpeonaed to testify in court so his partiality could never be proven! (See Appendix "E", App. 38, Plaintiff's Affidavit.)

At that juncture, Plaintiff and his counsel felt any further exhaustion of intra-union remedies would be futile and proceeded by way of suit.

FILING OF SUIT

As a result, a full Complaint in the instant suit (filed in the state court) was filed on or about May of 1980, three and one-half (3½) years after the discharge. The matter was removed to federal court by the

Union-Defendant. Thereupon, responsive pleadings were filed and the Parties engaged in discovery.

In July of 1982, the Union filed a Motion for Summary Judgment alleging the Plaintiff should have exhausted his union remedies through the international union procedures and level rather than proceed with suit and such was granted.

Nevertheless, it is the Plaintiff's position that not only did the conduct of the Union evidence a breach of the union's obligation to represent its members fairly and in good faith[4] which would now estop from

[4]The Plaintiff strenuously objects to what appears to be the lower court's blind reliance on the self-serving affidavit of Anthony Molinaro, Sr. (union agent) and use of his deposed statements to make its case. Obviously, the Plaintiff disputes Molinaro's position. Yet, the Union-Defendant uses these disputed statements in an attempt to "bootstrap" itself to a tenable legal position. These are the very issues of material fact that are disputed and cannot be relied upon in determining a Motion for Summary Judgment.

from alleging a failure to exhaust intra-union remedies, the union representatives knowingly prejudiced the Plaintiff's case and advised the Plaintiff to file the very suit to which the union now objects. Further, the time to file an international appeal had expired a year before the arbitration v. mediation hearing was ever held!

Subsequently, the Employer-Defendant filed a Motion for Summary Judgment and such was granted on the basis of the Union-Defendant's successful Motion for Summary Judgment. However, it must be remembered that the Plaintiff has not only alleged the Employer acted in concert with the Union, but failed to abide by the collective bargaining agreement in its own right. (See Appendix "D", App. 24, Paragraph 21 of the Complaint.) As a result, the Motions for Summary Judgment do not coincide in all regards and the employer's Motion for Summary Judgment need not have been necessarily granted on the basis of the union's

motion.

Additional details, where needed, are set out in the course of the Points which follow.

REASONS FOR GRANTING THE WRIT

The treatment of the Plaintiff's case demonstrates an alarming trend for the Courts of the Third Circuit to decide factual issues without hearings, without attempts to establish undisputed facts of record and thereby permit a Judge to usurp the function of a jury or other fact-finder in these matters.

Certainly, the concept of due process requires that a Plaintiff have his "day in court" on disputed fact issues wherein each side is given the opportunity to test the evidence and alleged facts through cross-examination and other truth-seeking tools.

Finally, this decision by the Third Circuit is squarely in conflict with other Circuits on the issue and such conflict can only be resolved by a review by this Honorable Court.

PREFATORY STATEMENT
(Applicable to all following points)

Rule 56 of the Federal Rules of Civil

Procedure permits a party to file a motion for summary judgment where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". (Rule 56(c).)

Case law is legion that a trial judge should be slow in granting a motion for summary judgment which deprives a litigant to a trial by jury where there is a reasonable indication that a material fact is in dispute. [Estepp v. Norfolk W. Ry. Co., 192 F.2d 889 (1951), Aetna Ins. Co. v. Cooper Wells & Co., 234 F.2d 342 (1956), Begnaud v. White, 170 F.2d 323 (1948), Stone v. Nelmor Corp., 101 F. Supp. 569 (1951)]

Summary judgment should be used sparingly so that no Plaintiff having a scintilla of merit to his cause should be denied his day in court. [Manok v. Southeast Dist. Bowling Association, 306 F. Supp. 1215 (1969), Dawn v. Sterling Drug, Inc., 319 F. Supp. 358 (1970).]

As a result, summary judgment is a remedy that is strictly construed and granted

sparingly. With this background, we move to the issues before this prestigious Court.

1.

Whether the granting (and affirmance) of the Defendants' Motions for Summary Judgment was proper wherein there are disputed material facts of record as to why the Plaintiff filed an action for wrongful discharge of employment without invoking the union's international procedures to review the grievance and the grounds for discharge.

2.

Does the action deprive the Petitioner of due process of the law since there was never any hearing in which undisputed "exhaustion of remedy" facts of record could be established upon which the Motion for Summary Judgment could be based.

[Points 1 and 2 are so related - Point 2 is

actually a single facet of the more inclusive Point 1 - that both are presented together.]

The synopsis herein is a two-fold and in the alternative. First, were there any disputed material facts of record since the Plaintiff, in this case, was not required to exhaust his internal union remedies or, secondly, and in the alternative, did the Plaintiff so exhaust them?

(a) The Plaintiff was not required to exhaust his intra-union remedies under the facts and circumstances of this case.

The Court of Appeals relies upon the case of Clayton v. United Auto Workers, 451 U.S. 679 101 S. Ct. 2088, 68 L.Ed.2d 538 (1981) for the principle that the Plaintiff is required to exhaust intra-union remedies prior to the initiation of suit. Yet, Clayton also holds that exhaustion is not required when an internal union appeals procedure cannot (a) "result in reactivation of the

employee's grievance..." or (b) "award the "complete relief sought..." 451 U.S. at 679, 101 S. Ct. at 2093. In the case at bar, these exceptions have been met.

First, the union in the case at bar has always taken the position a grievance was never filed. Accordingly, assuming arguendo there was never any grievance to pursue, the intra-union procedures would not have been available to reactivate a non-existent grievance. Secondly, time limits barred the Plaintiff from filing an international appeal after the "arbitration" hearing.

In a case styled Ruzicka v. General Motors Corporation, 532 F.2d 306 (1975), for twenty-seven (27) months an employee had sought intra-union relief against his local union and the Court held that was a sufficient exhaustion of his intra-union remedies to hear the case. In the present case, two (2) years after discharge was an "arbitration" hearing scheduled which was, in actuality, a mediation

session and in which the union's Business Agent would not participate since a stenographer was present. Prior to that time, and for a year following discharge, there had been no response at all from the union concerning the grievance and its status or disposition.

More importantly, it cannot be overlooked that the International Union is not a party defendant to this suit nor has it been joined by any other party. As a result, it could be argued the provisions of the International Constitution would not apply in the case at bar. "That the Union's appellate procedures are available and adequate in a general sense will not be relevant to situations where the Plaintiff claims that the system, as applied to him, was not available or adequate." (See Ritter v. Western Electric Company and International Brotherhood of Electrical Workers, 504 F. Supp. 886 (1980) footnote 16.) Further, where the exhaustion of said remedies is un-

available, inadequate or would entail meaningless or futile gestures, the union member need not exhaust same, even though he, as a union member, is contractually bound to do so. (See Ritter, supra, 504 F. Supp. at 888.)

In the case at bar, the Plaintiff has plead with specificity his attempts to exhaust his intra-union remedies. (See Appendix "D", App. 15-19, Paragraph 11 of the Complaint.) His attempts covered two (2) to three (3) years and the Plaintiff waited three and one-half (3½) years before filing the full Complaint. Then an "arbitration" hearing was eventually scheduled (two [2] years after discharge) but it was not a hearing as had been represented by the union Business Agent. It was a mediation session where the Mediator was already predisposed in favor of the union and the employer as the result of ex parte discussions of the case with and between the union and/or the employer. Also, the union representative advised that suit should be filed if the

Plaintiff was not happy with the situation. Finally, the Mediator refused to reschedule the hearing as an arbitration when requested by Plaintiff's counsel.

In Falsetti v. Local No. 2026, United Mine Workers of America, 400 Pa. 145, 161 A.2d 882 (1960), the Pennsylvania Supreme Court held there is no need for a member to exhaust internal remedies where (1) the officials have, by their own actions, precluded the member from having a fair or effective trial or appeal or where the association officials are obviously biased or have pre-judged the member's case before hearing it; (2) where the procedure is unduly burdensome; and, (3) where the remedies would subject the member to irreparable injury.

In the case at bar, the Complaint, Answers to Interrogatories and the two (2) affidavits contra to Defendant's Motion for Summary Judgment and the exhibits attached thereto (Appendix "D", "E" and "F", App. 13-55)

allege facts that show the Defendant's officials prejudiced the Plaintiff's case and prevented a fair and effective appeal since the union officials never even advised the Plaintiff or his counsel of the international intra-union remedies within the necessary appeal periods. Also, as heretofore indicated, the union Business Agent prejudiced the member's case before the Mediator. Thirdly, the procedure is unduly burdensome as applied to the Plaintiff since it had been over two (2) years[5] since the discharge and the matter had only been listed for a mediation session. Finally, such remedy would subject the Plaintiff to irreparable injury resulting from the lapse of time between the discharge date and final resolution.

The Union in the lower courts argued that the cases of McClain v. Mack Trucks, Inc.,

[5]In fact, it is interesting that in Clayton, supra, Justice Rehnquist (who was joined by Justices Stuart, Powell and Chief Justice Burger) in his dissent reasoned an employee should attempt to exhaust remedies for only four (4) months before bringing suit.

494 F. Supp. 114 (E.D. Pa. 1980) and Pawlak v. Teamsters Local 764, 444 F. Supp. 807 (M.D. Pa. 1977), aff. 571 F.2d 572 (3d Cir. 1978) which held the failure to exhaust the intra-union international procedures bars the Plaintiff from maintaining suit. Yet a close reading of McClain reveals the Plaintiff there did not contest or deny the adequacy or availability of such international constitutional procedures. In the case at bar, the Plaintiff does contest same since he was not even made aware of them and, more importantly, the conduct of the local union representative would cause a reasonable person to doubt their efficacy or availability. In Pawlak, the Court based its decision on the fact that Pawlak did receive a copy of and know of the international procedures. Nowhere in the case at bar is it alleged the Plaintiff did actually receive or was supplied with a copy of the international procedures until the Motion for Summary Judgment was filed by the Union.

Accordingly, it is the Plaintiff's position that under the facts and circumstances of this case and as applied to him, he was not required to exhaust intra-union remedies.

(b) If the Plaintiff was required to exhaust intra-union remedies, he did reasonably attempt to do so.

It is respectfully submitted the Plaintiff did reasonably attempt to exhaust the union remedies available to him.

In his Complaint, the Plaintiff as would be required, affirmatively pled the exhaustion of his intra-union remedies as a precondition of suit. (Cubas v. Rapid American Corp., 420 F. Supp. 663 [E.D. Pa. 1976].) Further, even if such was not the case, a Plaintiff would have been allowed to amend his Complaint to plead with greater specificity. (Lang v. Windsor Mount Joy Mutual Insurance Company, 487 F. Supp. 1303 [E.D. Pa. 1980] Holman v. Carpenter Technology Corporation, 484, F. Supp.

406 [E.D. Pa. 1980].)

Moreover, the collective bargaining agreement in effect between the Union-Defendant and the Employer-Defendant makes no mention of international union appeal machinery that would be applicable. Pursuant to Article XIII, Section 1, "Discharge or Suspension" (see Appendix "D", App. 36) there is no reference whatsoever to union appeal machinery relating to discharge.

Article XII deals with grievances (see Appendix "D", app. 26) and the language of that Article is worded to a mandatory and exclusive fashion:

> Section 1: Grievance Procedure
>
> All grievances or disputes...shall be handled in the manner hereinafter set forth...(emphasis supplied)

As a result, the Plaintiff did exhaust his remedies up to and including waiting two (2) years for an arbitration hearing, and then only to find the union merely scheduled a mediation session with a pre-disposed Mediator.

Then, to add insult to injury, the union would not proceed with the hearing or session since a stenographer was present. Was making a record of the proceedings that much of an imposition, especially when the Plaintiff was bearing the cost of same? The Plaintiff respectfully submits this question answers itself.

For the year following discharge, the Plaintiff would personally contact the union and employer concerning the status of his grievance and the status of his "lay-off". Yet, the union did not supply him with written reports of the Step One and Step Two meetings as required by Article XII aforementioned. In fact, the Plaintiff was told by the Business Agent, "I told you before, I'll contact you." (See Appendix "D", App. 17, Paragraph 11(e) of Complaint.)

After private counsel became involved and forwarded a series of letters requesting arbitration (such letters never being contra-

dicted, especially as to the status of the arbitration v. mediation hearing) a hearing was scheduled which the union cleverly led all to believe was a hearing pursuant to Article XII of the collective bargaining agreement. The Plaintiff appeared but the union, through its Business Agent, would not proceed.

As a result, pursuant to the aforesaid collective bargaining agreement, the Plaintiff, at that point, had reasonably attempted to exhaust his available remedies and proceeded with suit.

(c) The necessity of a hearing to establish the facts.

In a case styled Hines v. Local Union 377, Chauffeurs, Teamsters, Warehousemen and Helpers, 506 F.2d 1153 (1974), an action was brought by a truck driver for damages resulting from wrongful discharge and the union's breach of the duty of fair representation. There, summary judgment in favor of the union was

reversed. In doing so, the Court relied upon St. Clair v. Local No. 515, 422 F.2d 128 (1969) which held although the evidence of bad faith was minimal, there was enough to present a jury question (506 F.2d at 1155).

In the case at bar, there are substantial issues of material fact concerning the exhaustion issue, the union's actions in failing to abide by the applicable collective bargaining agreement, the employer recalling to work employees with less seniority (and the union not objecting to same), the propriety of the mediation v. arbitration strategy, the union's allegations of the non-existence of the grievance, so on.

In a case styled Willett v. Ford Motor Co., 583 F.2d 852 (1978), the court held there were sufficient facts to warrant a trial on a claim by an employee for improper discharge against the employee and failure to represent against the union. There the court held even one issue of disputed fact (concerning the notifi-

fication of the union's decision to drop the grievance) was sufficient.[5] Further, in Willett, the court, faced with conflicting affidavits, even held an evidentiary hearing to resolve the credibility issue. And it was made very clear that a court cannot resolve disputed issues of fact in ruling a motion for summary judgment. (Felix v. Young, 536 F.2d 1126, 1130 [1976].) As in Sarnoff, v. Ciaglia, 165 F.2d 167 (1947), a court cannot resolve issues of credibility on the basis of conflicting affidavits. In the case at bar, the affidavit of the Business Agent dealt solely with the Plaintiff's failure to exhaust his

[5]In Willett, as in the case at bar, the employee alleged the union did not, for five (5) months, inform the employee of its decision not to press the grievance past the second stage hearing, all while the employee was calling to find out what was happening. That would be evidence to support a finding of bad faith. In the instant case, this took place throughout the year after discharge. A fortiori, there is a genuine issue of material fact concerning the union's bad faith.

international union remedies and the denial of the Plaintiff's unfair labor practice charge. Contrasted to this, the Plaintiff's affidavit states he was never advised of these procedures and, as such, were not available to him and also averred is the conduct of the union during the course of pre-suit representation. There is even a dispute as to the exhaustion requirement whereby the Plaintiff would contact the union Business Agent to pursue the matter and the agent said "I told you before, I'll contact you." Certainly, these are disputed issues of material fact.

The Defendant-Union would have this Court believe that the only disputed issue goes to the union's failure to arbitrate in the case. As stated above, the Complaint, Affidavits and Deposition enumerate <u>many</u> areas of conduct that would classify as incomplete and improper union representation and would constitute failure to act in good faith if proven i.e. approving a recall of an employee with less

seniority but similarly situated, the reliance of the Plaintiff in believeing an arbitration hearing was to be scheduled, the non-applicability or the unavailabity of the international intra-union procedures, the Plaintiff's position that he was never advised of the "obey and grieve" rule, the Plaintiff's position that a grievance was filed at the local level and now denied by the local union, so on ad nauseum.

The due process clause of the U.S. Constitution provides no person shall be deprived of life, liberty or property...without due process of law." Certainly, the granting and affirmance of the Motion for Summary Judgment does so since, without a truth-seeking hearing, the Court accepts one version of disputed facts of record as true and grants a motion denying a Plaintiff of ever having his claim heard by a jury or fact-finder. This result cannot be justified under any principle of law.

3.

Does the aforesaid action deprive the Petitioner of due process of law since at least one other circuit (8th Circuit) has held that the issue of whether the Petitioner failed to exhaust his intra-union remedies (prior to the institution of suit) is not one appropriate for Summary Judgment.

In the case of Sandobal v. Armour & Co., 429 F.2d 249 (1970) the 8th Circuit of Appeals was called upon to decide a breach of an employment contract alleging loss of wages, loss of pension benefits and other concomitant benefits. Although it is unclear whether jurisdiction was based upon Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185, the Court ruled upon the issue of the exhaustion of remedies.

In Sandobal, the plaintiff, prior to the the institution of suit, complained of the action to union members and company officials,

had an attorney write two (2) letters and then encountered problems as the result of this private attorney representation since the union felt it was the exclusive bargaining agent for the plaintiff. Five (5) years after the discharge, suit was filed.[6]

Although the major issue in the case was whether summary judgment should be granted on the basis of the statute of limitations, the court also ruled in regard to the union alternate argument of non-exhaustion. In 429 F.2d at 257 we read:

> "This contention [summary judgment on the basis of non-exhaustion of union remedies] is not suitable for summary judgment in this case. There is a substantial disagreement between the parties as to whether the Plaintiff did attempt to comply with the grievance machinery and whether his efforts were blocked by the wrongful acts of the company and the union. These are issues of fact which must be determined by a full trial."

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[6]It is interesting to note that in the case at bar, the Plaintiff did far more in seeking to exhaust his union remedies.

In a case styled Holder v. Pet Bakery Division, I.C. Industries, Inc., 558 F. Supp. 287 (1982), the Court (in 558 F. Supp. at 291 n.6) reiterated the exhaustion issue were questions of fact citing Sandobal with approval.

In fact, it has been held that under certain state law, an employee suing for wrongful discharge under a collective bargaining agreement does not have to exhaust administrative remedies prior to filing suit. (Poppert v. Brotherhood of Railroad Trainmen, 189 N.W.2d 469 [Nebraska Supreme Court].)

In Fosbroke v. Emerson College, 503 F. Supp. 256 (1980) a professor sued a college for severance pay and the college filed a motion to dismiss since the union was not joined. The district court (1st Circuit, Mass.) denied the motion and reasoned in 503 F. Supp. at 257:

> "A Complaint should be dismissed if Plaintiff is not entitled to relief under any set of facts she could prove...If proven, the facts alleged would constitute a basis for recovery against the Defendant College, therefore the Complaint should not be dismissed."

In the case at bar, a review of the Complaint does, in fact, state a cause of action and should not be dismissed on a motion for summary judgment without a trial on the facts as alleged.

As a result, a conflict within the courts requires the highest court in the land to resolve this issue.

4.

Has the Plaintiff properly prayed for damages that would fall within the well recognized exceptions to the exhaustion requirement as found in Clayton, supra.

Contrary to the lower court's argument, the Plaintiff is seeking recovery of his lost job and back pay, but as collateral and consequential damages. A review of the Complaint, (see Appendix "D", App. 22 , Paragraph 16, the Prayer for Relief of the Complaint) reveals that "loss of employment,

lost wages and lost benefits "are prayed for as damages collateral to the union's breach of duty. As a result, the Clayton excpeitons are satisfied.

Further, had the Plaintiff directly asked for re-instatement, as the lower court proposes, the instant suit would have been federally pre-empted by Section 7 or Section 8 of the National Labor Relations Act. Instead, the Plaintiff seeks redress for the injury to the union-member relationship and collaterally askes for re-instatement, back pay and other consequential damages. In International Organization of Masters, Mates and Pilots of America, Local No. 2 v. International Organization of Masters, Mates and Pilots of America, 414 Pa. 277, 199 A.2d 432 (1964) U.S. cert. den. in 379 U.S. 840, the Pennsylvania Supreme Court held the lower court erred in holding its jurisdiction was pre-empted by the NLRB where the Plaintiff was seeking redress to his union-member relationship and not his employment

relationship. Nevertheless, even if the Plaintiff is seeking only redress of his union-member relationship, "collateral relief in the form of consequential damages for loss of employment was not to be denied" 414 Pa. at 282. In Butler v. Yellow Freight System, 374 F. Supp. 747 (1974), this court has affirmatively stated that district court must fashion appropriate remedies in Section 301 cases. Remedies under Section 301 must be carefully and specifically tailored to meet the problems and needs that arise in a particular case. Accordingly, the Plaintiff's claim for collateral and consequential damages is not only proper but provides the court the opportunity to fashion and tailor the remedies as deemed appropriate.

Further, the Plaintiff should not be penalized for a Complaint that may have been more artfully drawn. The Complaint challenges the union's role as fiduciary and should be upheld as was the Complaint in Richardson v.

Communication Workers of America, et al., 443 F.2d 974 (1971).

5.

Must the suit against the employer necessarily fail if the suit against the union is dismissed on a motion for summary judgment, where the suit against the union is for breach of its fiduciary duty to represent the Plaintiff and the suit against the employer is inter alia for breach of the collective bargaining agreement.

To be sure, the Plaintiff alleged the employer acted in concert with the union to deprive the Plaintiff of his rights. A decision on this issue concerning the union necessarily decides this issue concerning the employer.

Yet, it seeks to have been overlooked that the Plaintiff also alleges the employer, in its own capacity, failed to follow the collective bargaining agreement, Article XIII, by

failing to give a written notice of discharge, by failing to give a prior written warning and by discharging without just cause.

As a result, even if the claim against the Union fails, there are disputed issues of fact concerning the Plaintiff's claim against the employer on this issue and summary judgment is inappropriate.

CONCLUSION

> "The individual's interest may more often be initiated without indirectiveness or deliberate discrimination. Incomplete investigation of the facts, reliance on untested evidence, or colored evaluation of witnesses may lead the union to reject grievances which more objective inquiry would prove meritorious. Union officials burdened with institutional concerns may be willing to barter unrelated grievances or accept wholesale settlements if the total package is advantageous, even though some good grievances are lost. Concern for collective interests and the needs of the enterprise may dull the sense of personal service."

(Clyde W. Summers, "Individual Rights in Collective Agreements and Arbitration" 37 N.Y.

U.L. Rev. 362, 393 (1962).)

The actions of the lower courts in granting and affirming the motion for summary judgment smack of Mr. Summers' reflections.

The Plaintiff should be permitted a full and complete trial to prove his contentions. A deprivation of this right, is a deprivation of the principles upon which our American system of jurisprudence is based.

Respectfully submitted,

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APPENDIX

Separately Bound